

**Green, LindaE**

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**From:** Chris Horner <Christopher.Horner@cei.org>  
**Sent:** Friday, June 26, 2015 8:34 AM  
**To:** FOIA HQ  
**Subject:** FOIA Request -- Certain Agency Records re: Communications With/Regarding Michael Bradley, Carrie Jenks et al. and the Clean Energy Group  
**Attachments:** CEI EPA Bradley et al Clean Energy Group FOIA request.pdf

Please see the attached. Do not hesitate to contact me if you have any questions.

Best,  
Chris Horner  
202.262.4458 M



## REQUEST UNDER THE FREEDOM OF INFORMATION ACT

June 26, 2015

U.S. Environmental Protection Agency  
Records, FOIA and Privacy Branch  
1200 Pennsylvania Avenue, NW (2822T)  
Washington, D.C. 20460  
Email: [hq.foia@epa.gov](mailto:hq.foia@epa.gov)

### **FOIA Request – Certain Agency Records re: Communications With/Regarding Michael Bradley, Carrie Jenks et al. and the Clean Energy Group**

To EPA's National Freedom of Information Officer,

On behalf of the Competitive Enterprise Institute (CEI), please consider this request pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.* CEI is a non-profit public policy institute organized under section 501(c)3 of the tax code and with research, investigative journalism and publication functions, as well as a transparency initiative seeking public records relating to environmental and energy policy and how policymakers use public resources, all of which include broad dissemination of public information obtained under open records and freedom of information laws.

Please provide us, within twenty working days<sup>1</sup>, copies of all records meeting the following descriptions:

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<sup>1</sup> See *Citizens for Responsible Ethics in Washington v. Federal Election Commission*, 711 F.3d 180, 186 (D.C. Cir. 2013), and discussion, *infra*.

- 1) *emails and text messages that include as parties (i.e., sent to or from, including also as cc or bcc) any of the following three EPA employees i) Gina McCarthy, ii) Michael Goo (including all work-related emails sent to or from his private email accounts), and/or iii) Peter Tsirigotis, and any of the following Michael J Bradley Associates employees i) Michael Bradley, ii) Darlene Ryan, iii) Carrie Jenks and/or iv) any party at a “@mjbradley.com” address (that is, email or texts that include one of the three EPA employees and Mr. Bradley and/or anyone using a Bradley account);*
- 2) all mailing records, invoices, delivery notices or orders (e.g., FedEx, UPS, USPS<sup>2</sup>) from the offices that Goo, McCarthy and/or Tsirigotis worked in during the period covered by this request which indicate the letter/parcel was sent to or from i) Michael Bradley, ii) Darlene Ryan, iii) and/or Carrie Jenks; *and*
- 3) all visitor logs for EPA’s Sector Policies and Programs Division (D205-01), Research Triangle Park reflecting a visit by *Michael Bradley, Carrie Jenks and/or anyone listing an affiliation with or identifying Bradley Associates and/or the Clean Energy Group or “CEG” as the entity a visitor represents.*

All records responsive to this request will have been dated during the five-month period May 1, 2014 through September 30, 2014, inclusive.

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<sup>2</sup> For example, although EPA offices have a blanket purchase agreement for overnight shipping support with United Parcel Service (UPS), it is possible these individuals stepped outside that for a parcel(s) sent to (or, of course, received from) Mr. Bradley, Ms. Jenks, Ms. Ryan, and/or their client Clean Energy Group.

The records we seek are specifically described in a fashion allowing EPA to identify and locate them. No confusion should arise as to the records being sought. Requester asks that all records be provided in electronic form, as the records sought, being emails, attachments, and electronic documents, exist in electronic form.

**EPA Owes Requester a Reasonable, Non-Conflicted Search,  
and Must Err on the Side of Disclosure**

FOIA requires an agency to make a reasonable search of records, judged by the specific facts surrounding each request. *See, e.g., Itrurralde v. Comptroller of the Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003); *Steinberg v. DOJ*, 23 F.3d 548, 551 (D.C. Cir. 1994).

It is well-settled that Congress, through FOIA, “sought ‘to open agency action to the light of public scrutiny.’” *DOJ v. Reporters Comm. for Freedom of Press*, 498 U.S. 749, 772 (1989) (*quoting Dep’t of Air Force v. Rose*, 425 U.S. 353, 372 (1976)). The legislative history is replete with reference to the, “‘general philosophy of full agency disclosure’” that animates the statute. *Rose*, 425 U.S. at 360 (*quoting* S.Rep. No. 813, 89<sup>th</sup> Cong., 2<sup>nd</sup> Sess., 3 (1965)). Accordingly, when an agency withholds requested documents, the burden of proof is placed squarely on the agency, with all doubts resolved in favor of the requester. *See, e.g., Federal Open Mkt. Comm. v. Merrill*, 443 U.S. 340, 352 (1979). This burden applies across scenarios and regardless of whether the agency is claiming an exemption under FOIA in whole or in part. *See, e.g., Tax Analysts*, 492 U.S. 136, 142 n. 3 (1989); *Consumer Fed’n of America v. Dep’t of Agriculture*, 455 F.3d 283, 287 (D.C. Cir. 2006); *Burka*, 87 F.3d 508, 515 (D.C. Cir. 1996).

These disclosure obligations are to be accorded added weight in light of the recent Presidential directive to executive agencies to comply with FOIA to the fullest extent of the law specifically cited in my request to EPA to produce responsive documents.

*Presidential Memorandum For Heads of Executive Departments and Agencies*, 75 F.R. § 4683, 4683 (Jan. 21, 2009). As the President emphasized, “a democracy requires accountability, and accountability requires transparency,” and “the Freedom of Information Act... is the most prominent expression of a profound national commitment to ensuring open Government.” Accordingly, the President has directed that FOIA “be administered with a clear presumption: In the face of doubt, openness prevails” and that a “presumption of disclosure should be applied to all decisions involving FOIA.”

It is well-settled that Congress, through FOIA, “sought ‘to open agency action to the light of public scrutiny.’” *DOJ v. Reporters Comm. for Freedom of Press*, 498 U.S. 749, 772 (1989) (quoting *Dep’t of Air Force v. Rose*, 425 U.S. 353, 372 (1976)). The legislative history is replete with reference to the “‘general philosophy of full agency disclosure’” that animates the statute. *Rose*, 425 U.S. at 360 (quoting S.Rep. No. 813, 89<sup>th</sup> Cong., 2<sup>nd</sup> Sess., 3 (1965)). The act is designed to “pierce the veil of administrative secrecy and to open agency action to the light of scrutiny.” *Department of the Air Force v. Rose*, 425 U.S. 352 (1976). It is a transparency-forcing law, consistent with “the basic policy that disclosure, not secrecy, is the dominant objective of the Act.” *Id.*

A search must be “reasonably calculated to uncover all relevant documents.” *See, e.g., Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995). In determining whether or not a search is “reasonable,” courts have been mindful of the

purpose of FOIA to bring about the broadest possible disclosure. *See Campbell v. DOJ*, 164 F.3d 20, 27 (D.C. Cir. 1999) (“reasonableness” is assessed “consistent with congressional intent tilting the scale in favor of disclosure”).

The reasonableness of the search activity is determined ad hoc but there are rules, including that the search must be conducted free from conflict of interest. (In searching for relevant documents, agencies have a duty “to ensure that abuse and conflicts of interest do not occur.” *Cuban v. S.E.C.*, 744 F.Supp.2d 60, 72 (D.D.C. 2010). *See also Kempker-Cloyd v. Department of Justice*, No. 97-cv-253, 1999 U.S. Dist. LEXIS 4813, at \*12, \*24 (W.D. Mich. Mar. 12, 1999) (holding that the purpose of FOIA is defeated if employees can simply assert that records are personal without agency review; faulting the Department of Justice for the fact that it “was aware that employee had withheld records as ‘personal’ but did not require that ‘he submit those records for review’ by the Department.).

#### Withholding and Redaction

Please identify and inform us of all responsive or potentially responsive records within the statutorily prescribed time, and the basis of any claimed exemptions or privilege and to which specific responsive or potentially responsive record(s) such objection applies.

If EPA claims any records or portions thereof are exempt under one of FOIA’s discretionary exemptions we request you exercise that discretion and release them consistent with statements by the President and Attorney General, *inter alia*, that “**The old rules said that if there was a defensible argument for not disclosing something to**

**the American people, then it should not be disclosed. That era is now over, starting today” (President Barack Obama, January 21, 2009), and “Under the Attorney General’s Guidelines, agencies are encouraged to make discretionary releases. Thus, even if an exemption would apply to a record, discretionary disclosures are encouraged.** Such releases are possible for records covered by a number of FOIA exemptions, including Exemptions 2, 5, 7, 8, and 9, but they will be most applicable under Exemption 5.” (Department of Justice, Office of Information Policy, OIP Guidance, “Creating a ‘New Era of Open Government’”). Moreover, we note that information cannot be exempt from production as “proprietary” information if it was widely disseminated outside EPA and any organization with proprietary rights to the data in question.

Nonetheless, if your office takes the position that any portion of the requested records is exempt from disclosure, please inform us of the basis of any partial denials or redactions. In the event that some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable, non-exempt portions of the requested records. See 5 U.S.C. §552(b).

Further, we request that you provide us with an index of those withheld documents as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), with sufficient specificity “to permit a reasoned judgment as to whether the material is actually exempt under FOIA” pursuant to *Founding Church of Scientology v. Bell*, 603 F.2d 945, 959 (D.C. Cir. 1979), and “describ[ing] each document or portion thereof withheld, and

for each withholding it must discuss the consequences of supplying the sought-after information.” *King v. Department of Justice*, 830 F.2d 210, 223-24 (D.C. Cir. 1987).

We remind EPA it cannot withhold entire documents rather than produce their “factual content” and redact any confidential advice and opinions. As the D.C. Circuit Court of Appeals noted, the agency must “describe the factual content of the documents and disclose it or provide an adequate justification for concluding that it is not segregable from the exempt portions of the documents.” *Id.* at 254 n.28. As an example of how entire records should not be withheld when there is reasonably segregable information, we note that basic identifying information (who, what, when) is not “deliberative”. As the courts have emphasized, “the deliberative process privilege directly protects advice and opinions and *does not permit the nondisclosure of underlying facts* unless they would indirectly reveal the advice, opinions, and evaluations circulated within the agency as part of its decision-making process.” *See Mead Data Central v. Department of the Air Force*, 566 F.2d 242, 254 n.28 (D.C. Cir. 1977) (emphasis added).

If it is your position that a document contains non-exempt segments and that those non-exempt segments are so dispersed throughout the documents as to make segregation impossible, please state what portion of the document is non-exempt and how the material is dispersed through the document. *See Mead Data Central v. Department of the Air Force*, 455 F.2d at 261.

**Claims of non-segregability must be made with the same practical detail as required for claims of exemption in a *Vaughn* index.** If a request is denied in whole,

please state specifically that it is not reasonable to segregate portions of the record for release.

**Satisfying this request contemplates providing copies of documents, in electronic format if you possess them as such, otherwise photocopies are acceptable.**

Please provide responsive documents in complete form, with any appendices or attachments as the case may be.

#### Request for Fee Waiver

**This discussion through page 19** is detailed as a result of our recent experience of agencies improperly using denial of fee waivers to impose an economic barrier to access, an improper means of delaying or otherwise denying access to public records, despite our history of regularly obtaining fee waivers. We are not alone in this experience.<sup>3</sup> **It is only relevant if EPA considers denying our fee waiver request.**

#### **A. Pursuant to the Public Interest, 5 U.S.C. § 522(a)(4)(A)(iii)**

##### **1. Subject of the Request**

Potentially responsive records will inform the public about the process of development of EPA policy and the interaction between EPA and industry groups. This issue has come to light in the context of how EPA employees interact with the Clean Energy Group/its lobbyists and the role that group and its lobbyists have played in

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<sup>3</sup> See February 21, 2012 letter from public interest or transparency groups to four federal agencies requesting records regarding a newly developed pattern of fee waiver denials and imposition of “exorbitant fees” under FOIA as a barrier to access, available at <http://images.politico.com/global/2012/03/acluefffeewvrfoialtr.pdf>; see also *National Security Counselors v. CIA* (CV: 12-cv-00284(BAH), filed D.D.C Feb. 22, 2012); see also “Groups Protest CIA’s Covert Attack on Public Access,” OpenTheGovernment.org, February 23, 2012, <http://www.openthegovernment.org/node/3372>.

influencing EPA employees, and whether this resulted in alterations to EPA policy outside of proper channels.

We emphasize that a requester need not demonstrate that the records would contain any particular evidence, such as of misconduct. Instead, the question is whether the requested information is likely to contribute significantly to public understanding of the operations or activities of the government, period. *See Judicial Watch v. Rosotti*, 326 F. 3d 1309, 1314 (D.C.Cir. 2003).

2. Informative value of the information

FOIA requesters and other individuals and organizations concerned with good government and otherwise concerned with wise use of taxpayer money, and sound environmental and energy policy, have a clear interest in this topic. Questions of how EPA employees interact with representatives of industry groups and the nature of those interactions is critical for determining whether EPA decisions were developing in an even-handed manner and in evaluating EPA policy. The public has no other means to secure this information other than through the Freedom of Information Act. This makes the information sought highly likely to significantly contribute to an understanding of government operations and activities.

3. Contribution to an understanding by the general public.

Requester has a record of obtaining and producing information as would a news media outlet and as a legal/policy organization that broadly disseminates information on important energy and environmental policy related issues, including how various agencies related to energy and environmental policies conduct themselves related to

transparency efforts from outside organizations such as CEI. In addition to functionally being a news outlet, both requester has disseminated its work in a manner that results in coverage by national news outlets on television, in national newspapers, and in policy newsletters from state and national policy institutes.<sup>4</sup>

Requester has a recognized interest in and reputation for leading relevant policy debates and expertise in the subject of energy and environment-related regulatory policies, including how related agencies respond to transparency efforts, and it and its staff's publications demonstrate requester has the "specialized knowledge" and "ability and intention" to broadly disseminate the information requested in the broad manner, and

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<sup>4</sup> See e.g., Stephen Dinan, *Do Text Messages from Feds Belong on Record? EPA's Chief's Case Opens Legal Battle*, WASHINGTON TIMES, Apr. 30, 2011, at A1. Other outlets covering this dissemination include Peter Foster, *More Good News for Keystone*, NATIONAL POST, Jan. 9, 2013, at 11; Juliet Eilperin, *EPA IG Audits Jackson's Private E-mail Account*, THE WASHINGTON POST, Dec. 19, 2013, at A6; James Gill, *From the Same Town, But Universes Apart*, THE NEW ORLEANS TIMES-PICAYUNE, Jan. 2, 2013, at B1; Kyle Smith, *Hide & Sneak*, THE NEW YORK POST, Jan. 6, 2013, at 23. See also, Stephen Dinan, *EPA Staff to Retrain on Open Records; Memo Suggests Breach of Policy*, THE WASHINGTON TIMES, Apr. 9, 2013, at A4; Stephen Dinan, *Suit Says EPA Balks at Release of Records; Seeks Evidence of Hidden Messages*, WASHINGTON TIMES, Apr. 2, 2013, at A1, Stephen Dinan, "Researcher: NASA hiding climate data", *Washington Times*, Dec. 3, 2009, at A1, Dawn Reeves, *EPA Emails Reveal Push To End State Air Group's Contract Over Conflict*, INSIDE EPA, Aug. 14, 2013. See also Stephen Dinan, [\*EPA's use of secret email addresses was widespread: report\*](#), WASHINGTON TIMES, Feb. 13, 2014; see also, Christopher C. Horner, *EPA administrators invent excuses to avoid transparency*, THE WASHINGTON EXAMINER, Nov. 25, 2012, <http://washingtonexaminer.com/epa-administrators-invent-excuses-to-avoid-transparency/article/2514301#.ULOaPYf7L9U>; see also Christopher C. Horner, *EPA Circles Wagons in 'Richard Windsor' Email Scandal*, BREITBART, Jan. 16, 2013, <http://www.breitbart.com/Big-Government/2013/01/16/What-s-in-a-Name-EPA-Goes-Full-Bunker-in-Richard-Windsor-EMail-Scandal>. See also, *100 People to Watch this Fall*, THE HILL, Aug. 7, 2013, <http://thehill.com/business-a-lobbying/315837-100-people-to-watch-this-fall-?start=7>

to do so in a manner that significantly contributes to the understanding of the “public-at-large.”

4. Significance to Public Understanding

Repeating by reference the above discussion, only by EPA releasing this information will public interest groups such as requester, the media, and the public at large see this information first hand and draw their own conclusions concerning the nature of the interactions between EPA employees and industry representatives, and whether EPA employees have allowed the Clean Energy Group undue influence including whether they worked outside of proper regulatory channels on key proposals.

**B. Commercial Interest of Requester**

1. No Commercial Interest

Requester is organized and recognized by the Internal Revenue Service as a 501(c)(3) educational organization. Requester does not charge for copies of reports. The requested information is not sought for a commercial purpose and cannot result in any form of commercial gain to requester, which has absolutely no commercial interest in the records.

2. Primary Interest in Disclosure

With no possible commercial interest in these records, an assessment of that non-existent interest is not required in any balancing test with the public’s interest. Requester also satisfies this factor as news media outlets.<sup>5</sup>

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<sup>5</sup> See discussion beginning p. 17.

As such and also for the following reasons requester seeks waiver or reduction of all costs pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) (“Documents shall be furnished without any charge...if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of government and is not primarily in the commercial interest of the requester”) (As we request documents in electronic format, there should be no copying costs).

As a non-commercial requester, requester is entitled to liberal construction of the fee waiver standards. 5 U.S.C. § 552(a)(4)(A)(iii), *Perkins v. U.S. Department of Veterans Affairs*, 754 F. Supp. 2d 1 (D.D.C. 2010). Specifically, the public interest fee waiver provision “is to be liberally construed in favor of waivers for noncommercial requesters.” *McClellan Ecological Seepage Situation v. Carlucci*, 835 F. 2d 1284, 2184 (9th Cir. 1987). FOIA is aimed in large part at promoting active oversight roles of watchdog public advocacy groups. “The legislative history of the fee waiver provision reveals that it was added to FOIA ‘in an attempt to prevent government agencies from using high fees to discourage certain types of requesters, and requests,’ in particular those from journalists, scholars and nonprofit public interest groups.” *Better Government Ass’n v. State*, 780 F.2d 86, 88-89 (D.C. Cir. 1986)(fee waiver intended to benefit public interest watchdogs), citing to *Ettlinger v. FBI*, 596 F. Supp.867, 872 (D.Mass. 1984); SEN.

COMM. ON THE JUDICIARY, AMENDING THE FOIA, S.REP. NO. 854, 93rd Cong., 2d Sess. 11-12 (1974)).<sup>6</sup>

Congress enacted FOIA clearly intending that “fees should not be used for the purpose of discouraging requests for information or as obstacles to disclosure of requested information.” *Ettlinger v. FBI*, citing Conf. Comm. Rep., H.R. Rep. No. 1380, 93d Cong., 2d Sess. 8 (1974) at 8. Improper refusal of fees as a means of withholding records from a FOIA requester constitutes improper withholding. *Ettlinger v. FBI*. Given this, “insofar as ...[agency] guidelines and standards in question act to discourage FOIA requests and to impede access to information for precisely those groups Congress intended to aid by the fee waiver provision, they inflict a continuing hardship on the non-profit public interest groups who depend on FOIA to supply their lifeblood -- information.” *Better Gov’t v. State* at 94 (internal citations omitted). The courts therefore will not permit such application of FOIA requirements that “‘chill’ the ability and willingness of their organizations to engage in activity that is not only voluntary, but that Congress explicitly wished to encourage.” *Id.*

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<sup>6</sup> This was grounded in the recognition that the two plaintiffs in that merged appeal were, like requester, public interest non-profits that “rely heavily and frequently on FOIA and its fee waiver provision to conduct the investigations that are essential to the performance of certain of their primary institutional activities -- publicizing governmental choices and highlighting possible abuses that otherwise might go undisputed and thus unchallenged. These investigations are the necessary prerequisites to the fundamental publicizing and mobilizing functions of these organizations. Access to information through FOIA is vital to their organizational missions.” *Better Gov’t v. State* at 93. They therefore, like requester, “routinely make FOIA requests that potentially would not be made absent a fee waiver provision”, requiring the court to consider the “Congressional determination that such constraints should not impede the access to information for appellants such as these.” *Id.*

As such, agency implementing regulations may not facially or in practice interpret FOIA's fee waiver provision in a way creating a fee barrier for requesters. "This is in keeping with the statute's purpose, which is 'to remove the roadblocks and technicalities which have been used by . . . agencies to deny waivers.'" *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Educ.*, 593 F. Supp. 261, 268 (D.D.C. 2009), *citing to McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987)(quoting 132 Cong. Rec. S16496 (Oct. 15, 1986) (statement of Sen. Leahy)).

Requester's ability to utilize FOIA -- as well as many nonprofit organizations, educational institutions and news media who will benefit from disclosure -- depends on its ability to obtain fee waivers. For this reason, "Congress explicitly recognized the importance and the difficulty of access to governmental documents for such typically under-funded organizations and individuals when it enacted the 'public benefit' test for FOIA fee waivers. This waiver provision was added to FOIA 'in an attempt to prevent government agencies from using high fees to discourage certain types of requesters and requests,' in a clear reference to requests from journalists, scholars and, most importantly for our purposes, nonprofit public interest groups. Congress made clear its intent that fees should not be utilized to discourage requests or to place obstacles in the way of such disclosure, forbidding the use of fees as "toll gates" on the public access road to information.'" *Better Gov't Ass'n v. Department of State* 780 F.2d 86, 94 (D.C. Cir. 1986).

As the *Better Government* court also recognized, public interest groups employ FOIA for activities "essential to the performance of certain of their primary institutional activities — publicizing governmental choices and highlighting possible abuses that otherwise

might go undisputed and thus unchallenged. These investigations are the necessary prerequisites to the fundamental publicizing and mobilizing functions of these organizations. Access to information through FOIA is vital to their organizational missions.” That is true in the instant matter as well.

Courts have noted FOIA’s legislative history to find that a fee waiver request is likely to pass muster “if the information disclosed is new; supports *public* oversight of agency operations, including the quality of agency activities and the effects of agency policy or regulations on public health or safety; *or, otherwise confirms or clarifies data on past or present operations of the government.*” *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d at 1284-1286. (*emphasis added*). This information request meets that description, for reasons both obvious and specified. The subject matter of the requested records specifically concerns identifiable operations or activities of the government.

The requested records, pertain to EPA’s activities of great public interest, as previously described. They also directly relate to high-level promises by the President of the United States and the Attorney General to be “the most transparent administration ever.”

This transparency promise, in its serial incarnations, demanded and spawned widespread media coverage, and then of the reality of the administration’s transparency efforts, and numerous transparency-oriented groups reporting on this performance, prompting further media and public interest (*see, e.g.*, an internet search of “study Obama transparency”). As such, requester has stated “with reasonable specificity that their

request pertains to “operations of the government,” and “the informative value of a request depends not on there being certainty of what the documents will reveal, but rather on the requesting party having explained with reasonable specificity how those documents would increase public knowledge of the functions of government.” *Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Health and Human Services*, 481 F. Supp. 2d 99, 107-109 (D.D.C. 2006).

Finally, we note that EPA has waived requester’s fees for substantial productions arising from requests expressing the same intention, even using the same language as used in the instant request.<sup>7</sup> This is also true of other federal agencies.<sup>8</sup>

For all of these reasons, CEI’s fees should be waived in the instant matter.

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<sup>7</sup> See, e.g., no fees required by EPA for processing often substantial numbers of records on the same or nearly the same but less robust waiver-request language (CEI): EPA-HQ-2013-000606, HQ-FOI-01087-12, EPA-HQ-2013-001343, EPA-R6-2013-00361, EPA-R6-2013-00362, EPA-R6-2013-00363, HQ-FOI-01312-10, R9-2013-007631, HQ-FOI-01268-12, HQ-FOI-01269, HQ-FOI-01270-12. These examples involve EPA either waiving fees, not addressing the fee issue, or denying fee waiver but dropping that posture when requester sued.

<sup>8</sup> See, e.g., no fees required by other agencies for processing often substantial numbers of records on the same or nearly the same but less robust waiver-request language include: **DoI** OS-2012-001113, OS-2012-00124, OS-2012-00172, FWS-2012-00380, BLM-2014-00004, BLM-2012-016, BLM: EFTS 2012-00264, CASO 2012-00278, NVSO 2012-00277; **NOAA** 2013-001089, 2013-000297, 2013-000298, 2010-0199, and “Peterson-Stocker letter” FOIA (August 6, 2012 request, no tracking number assigned, records produced); **DoL** (689053, 689056, 691856 (all from 2012)); **FERC** 14-10; **DoE** HQ-2010-01442-F, 2010-00825-F, HQ-2011-01846, HQ-2012-00351-F, HQ-2014-00161-F, HQ-2010-0096-F, GO-09-060, GO-12-185, HQ-2012-00707-F; **NSF** (10-141); **OSTP** 12-21, 12-43, 12-45, 14-02.

**Alternately, CEI qualifies as a media organization for purposes of fee waiver**

The provisions for determining whether a requesting party is a representative of the news media, and the “significant public interest” provision, are not mutually exclusive. Again, as CEI is a non-commercial requester, it is entitled to liberal construction of the fee waiver standards. 5 U.S.C.S. § 552(a)(4)(A)(iii), *Perkins v. U.S. Department of Veterans Affairs*. Alternately and only in the event EPA deviates from prior practice on similar requests and refuses to waive our fees under the “significant public interest” test, which we would then appeal while requesting EPA proceed with processing on the grounds that we are a media organization, we request a waiver or limitation of processing fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(“fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by.... a representative of the news media...” ) and 40 C.F.R. §2.107(d) (1) (“No search or review fees will be charged for requests by educational institutions...or representatives of the news media.”).

However, we note that as documents are requested and available electronically, there are no copying costs.

Requester repeats by reference the discussion as to its publishing practices, reach and intentions to broadly disseminate, all in fulfillment of CEI’s mission, set forth *supra*.

Also, the federal government has already acknowledged that CEI qualifies as a media organization under FOIA.<sup>9</sup>

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<sup>9</sup> See e.g., Treasury FOIA Nos. 2012-08-053, 2012-08-054.

The key to “media” fee waiver is whether a group publishes, as CEI most surely does. *See supra*. In *National Security Archive v. Department of Defense*, 880 F.2d 1381 (D.C. Cir. 1989), the D.C. Circuit wrote:

The relevant legislative history is simple to state: because one of the purposes of FIRA is to encourage the dissemination of information in Government files, as Senator Leahy (a sponsor) said: “It is critical that the phrase ‘representative of the news media’ be broadly interpreted if the act is to work as expected.... If fact, *any person or organization which regularly publishes or disseminates information to the public ... should qualify for waivers as a ‘representative of the news media.’*”

*Id.* at 1385-86 (emphasis in original).

As the court in *Electronic Privacy Information Center v. Department of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003) noted, this test is met not only by outlets in the business of publishing such as newspapers; instead, citing to the *National Security Archives* court, it noted one key fact is determinative, the “*plan to act, in essence, as a publisher*, both in print and other media.” *EPIC v. DOD*, 241 F.Supp.2d at 10 (*emphases added*). “In short, the court of appeals in *National Security Archive* held that ‘[a] representative of the news media is, in essence, a person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience.’” *Id.* at 11. *See also, Media Access Project v. FCC*, 883 F.2d 1063, 1065 (D.C. Cir. 1989).

For these reasons, CEI plainly qualifies as a “representative of the news media” under the statutory definition, because it routinely gathers information of interest to the public, uses editorial skills to turn it into distinct work, and distributes that work to the public.

The information is of critical importance to the nonprofit policy advocacy groups engaged on these relevant issues, news media covering the issues, and others concerned with EPA activities in this controversial area, or as the Supreme Court once noted, what their government is up to.

For these reasons, requester qualifies as a “representative[] of the news media” under the statutory definition, because it routinely gathers information of interest to the public, uses editorial skills to turn it into distinct work, and distributes that work to the public. *See Electronic Privacy Information Center v. Department of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003)(non-profit organization that gathered information and published it in newsletters and otherwise for general distribution qualified as representative of news media for purpose of limiting fees). Courts have reaffirmed that non-profit requesters who are not traditional news media outlets can qualify as representatives of the new media for purposes of the FOIA, particularly after the 2007 amendments to FOIA. *See ACLU of Washington v. U.S. Dep’t of Justice*, No. C09-0642RSL, 2011, 2011 U.S. Dist. LEXIS 26047 at \*32 (W.D. Wash. Mar. 10, 2011). *See also Serv. Women’s Action Network v. DOD*, 2012 U.S. Dist. Lexis 45292 (D. Conn., Mar. 30, 2012).

Accordingly, if EPA determines CEI is instead a media requester, any fees charged must be limited to duplication costs. The records requested are available electronically and are requested in electronic format, so there should be no costs.

## **Conclusion**

We expect EPA to release within the statutory period all responsive records and any segregable portions of responsive records containing properly exempt information, to disclose records possibly subject to exemptions to the maximum extent permitted by FOIA's discretionary provisions and otherwise proceed with a bias toward disclosure, consistent with the law's clear intent, judicial precedent affirming this bias, and President Obama's directive to all federal agencies on January 26, 2009. Memo to the Heads of Exec. Offices and Agencies, Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 26, 2009)(“The Freedom of Information Act should be administered with a clear presumption: in the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, or because of speculative or abstract fears).

**We expect all aspects of this request including the search for responsive records be processed free from conflict of interest. On a related note, we note that EPA must consider that Michael Goo has been demonstrated to have used private email for certain EPA-related correspondence with lobbyists, and had and has sole control over the non-official account.**

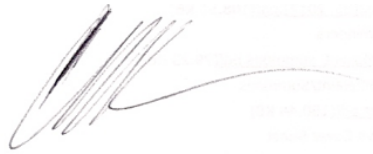
We request EPA provide particularized assurance that it is reviewing some quantity of records with an eye toward production on some estimated schedule, so as to establish some reasonable belief that it is processing our request. 5 U.S.C.A. § 552(a)(6) (A)(i). EPA must at least inform us of the scope of potentially responsive records, including the scope of the records it plans to produce and the scope of documents that it

plans to withhold under any FOIA exemptions; FOIA specifically requires EPA to immediately notify CEI with a particularized and substantive determination, and of its determination and its reasoning, as well as CEI's right to appeal; further, FOIA's unusual circumstances safety valve to extend time to make a determination, and its exceptional circumstances safety valve providing additional time for a diligent agency to complete its review of records, indicate that responsive documents must be collected, examined, and reviewed in order to constitute a determination. *See Citizens for Responsible Ethics in Washington v. Federal Election Commission*, 711 F.3d 180, 186 (D.C. Cir. 2013). See also; *Muttitt v. U.S. Central Command*, 813 F. Supp. 2d 221; 2011 U.S. Dist. LEXIS 110396 at \*14 (D.D.C. Sept. 28, 2011)(addressing "the statutory requirement that [agencies] provide estimated dates of completion").

We request a rolling production of records, such that the agency furnishes records to my attention as soon as they are identified, preferably electronically, but as needed then to my attention, at the address below. We inform EPA of our intention to protect our appellate rights on this matter at the earliest date should EPA not comply with FOIA per, *e.g.*, *CREW v. FEC*.

If you have any questions please do not hesitate to contact me. I look forward to your timely response.

Sincerely,

A handwritten signature in dark ink, appearing to be 'C. Horner', with a long, sweeping horizontal line extending to the right.

Christopher C. Horner  
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